No. 15741

In the United States Court of Appeals for the Ninth Circuit

IRWIN ARAN, doing business as AUTO NURSE MANUFACTURING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEE

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INDEX

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OPINION BELOW

The amended findings of fact, conclusions of law and judgment of the District Court (R. 35-39) are not yet reported.

JURISDICTION

This appeal involves manufacturer's excise taxes in the amount of $6,877.99 paid between February 14, 1951, and November 17, 1954. (R. 35-36.)[1] Tax-

[1] The complaint asked for a refund of $8,208.62 paid between April 1, 1949, and November 17, 1954, (R. 3, 20), but the District Court held that only the sum of $6,877.99 was paid during the four years immediately preceding the filing

payer filed a claim for refund on February 14, 1955, which was disallowed on August 8, 1956. (R. 21.) Taxpayer's complaint in this action was filed against the United States in the District Court for the Southern District of California on September 12, 1956 (R. 1-4), or more than six months after the filing of the claim for refund and within the time provided in Section 3772 of the Internal Revenue Code of 1939, for refund of amounts which had allegedly been paid erroneously. Jurisdiction was conferred on the District Court by 28 U.S.C. Section 1340. Judgment was entered in favor of the United States on May 16, 1957. (R. 39.) Within 60 days, and on July 11, 1957, the taxpayer filed a notice of appeal. (R. 40.) Jurisdiction is conferred on this Court by 28 U.S.C. Section 1291.

QUESTION PRESENTED [2]

Did the District Court err in holding that baby bottle warmers manufactured and sold by the taxpayer, which operate by electrical connection with an automobile cigarette lighter receptacle, are taxable as an automobile accessory within the meaning of

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of the taxpayer's claim for refund on February 14, 1955, and that $1,330.63 of the amount originally claimed paid between May 31, 1949, and February 14, 1951, was barred by the four-year period of limitations specified in Section 3313 of the Internal Revenue Code of 1939 as amended by Section 207(b) (2), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477 (R. 35-36, 37). The taxpayer has not appealed from that holding. (R. 40, 47-48).

[2] Neither the taxpayer nor the United States has appealed from the decision on other issues. (R. 40, 47-48).

Section 3403(c) of the Internal Revenue Code of 1939?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Treasury Regulations are printed in the Appendix, *infra*.

STATEMENT

The facts as stipulated by the parties (R. 20-22) and as found by the District Court (R. 35-37) may be summarized as follows:

During the time in question, taxpayer was the manufacturer of baby bottle warmers fitted with a cord and connection capable of being inserted into the cigarette lighter of automobiles equipped with such a lighter. These bottle warmers are primarily used by parents with infant children and are primarily sold in baby, drug and department stores. (R. 20, 37.)

In a letter from the United States Treasury Department dated February 4, 1955, signed by R. J. Bopp, Chief, Excise Tax Branch, it was ruled that taxpayer's baby bottle warmer is not considered to be an automobile part or accessory, and, therefore, is not subject to manufacturers' excise tax. By letter dated December 8, 1955, the Internal Revenue Service notified taxpayer that it had given further consideration to the ruling made by it on February 4, 1955, and now concludes that taxpayer's baby bottle warmer as described in taxpayer's letter of November 27, 1954, is primarily designed and adapted for use in connection with vehicles taxable under section 4061

(a) of the 1954 Internal Revenue Code and that its ruling to taxpayer under date of February 4, 1955, was reversed, making taxpayer's baby bottle warmers subject to the tax above. (R. 20-21.)

The District Court found that taxpayer's baby bottle warmers were primarily adapted for use in connection with taxable vehicles and not equally well adapted for other uses within the meaning of Section 3403(c) of the Internal Revenue Code of 1939 and held that they are, therefore, subject to manufacturers' excise tax as an auto part or accessory. (R. 35-38.) From that decision the taxpayer has appealed to this Court. (R. 40.)

SUMMARY OF ARGUMENT

The sales of baby bottle warmers were taxable as sales of automobile accessories by the taxpayer manufacturer within the meaning of Section 3403 of the Internal Revenue Code of 1939. It is clear that the articles in question, which operate by means of an electrical connection with the cigarette lighter on automobiles, fall within the term "parts or accessories" under the statute as interpreted by the Treasury Regulations inasmuch as the primary use of the baby bottle warmers is in connection with an automobile. Congress could not have intended to tax only parts and accessories enumerated in the statute, for it would have been futile for it to have enumerated all automobile parts and accessories, particularly in view of the many changes and improvements constantly occurring in this field. The Regulations,

which were reasonably designed to give effect to Congressional intention, have been in effect for many years, during which time the statute has been reenacted in substantially similar terms.

Under the Treasury Regulations, a taxable article need not be essential to the operation or use of an automobile. Moreover, the baby bottle warmers here in question were not equally well adapted for other uses than in connection with an automobile, as the District Court found. Whatever use they may have had as heat retainers or bottle holders was incidental to their primary use to warm bottles which could not be done except by electrical connection with the cigarette lighter of an automobile. The record clearly supports the District Court's findings, and the taxpayer failed to carry the burden of proving that the primary purpose of the articles was other than in connection with automobiles.

The Treasury Department has consistently ruled that similar articles, such as heating pads, utility lights, and air conditioning units, designed to operate from a cigarette lighter plug in an automobile, are taxable as automobile accessories. That the Treasury Department earlier ruled that taxpayer's baby bottle warmers were not taxable is immaterial, inasmuch as the Commissioner can, even with retroactive effect, remedy prior incorrect rulings.

ARGUMENT

The Sales Of Baby Bottle Warmers Were Taxable As Sales Of Automobile Accessories By The Taxpayer Manufacturer Within The Meaning Of Section 3403 Of The Internal Revenue Code Of 1939

The sole issue in this case is whether taxpayer is entitled to a refund of manufacturer's excise taxes paid on the sales of baby bottle warmers which he manufactured and sold. These articles operate by means of an electrical connection with the cigarette lighter on automobiles. The taxpayer questions (Br. 10-20) the District Court's finding (R. 36, 38) that the baby bottle warmers were primarily adapted for use in connection with a taxable vehicle within the meaning of Code of 1939 Section 3403(c), and asserts that in order to be an automobile accessory within this section of the Code an article must aid in the performance, utility, or function of the automobile itself. He contends (Br. 15-16) that the Treasury Regulations defining automobile accessories are unreasonable extensions of the statute, and that Congress must have intended to tax only articles which aid directly in the operation, function, or ornamentation of the vehicle. It is submitted that there is no merit to these contentions, and that the District Court was correct in holding the baby bottle warmers subject to the manufacturer's excise tax as an automobile accessory.

Section 3403(c) of the Internal Revenue Code of 1939, Appendix *infra*, provides that an 8% tax[3]

[3] For a brief period here involved prior to November 1, 1951, the tax rate was 5%.

shall be imposed on automobile parts or accessories, with certain exceptions not material here. Treasury Regulations 46, Section 316.55, Appendix *infra*, define "parts or accessories" to include:

> (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article *whether or not essential to its operation or use.* (Italics supplied.)

It is clear that the baby bottle warmers here in question fall within the term "parts or accessories" under the statute as interpreted by the Treasury Regulations for, contrary to taxpayer's contention (Br. 10-20), the primary use of the baby bottle warmers is in connection with an automobile. The District Court so found, and stated specifically that the articles were not equally well adapted for uses other than in connection with an automobile. (R. 36, 38.)

Whether certain articles are primarily adapted for use on automobiles so as to constitute "parts and accessories" within the meaning of the Code is a question of fact in each case. *Benmatt Organization, Inc.* v. *United States*, 236 F. 2d 959 (C.A. 9th), affirming *per curiam* 134 F. Supp. 511 (S.D. Cal.). Where, as here, the findings of the court below are clearly supported by the evidence, they should not be disturbed on appeal unless clearly erroneous. *United States* v. *Real Estate Boards*, 339 U.S. 485; *United States* v.

Gypsum Co., 333 U.S. 364, rehearing denied, 333 U.S. 869.

There is no merit to taxpayer's argument (Br. 11) that Congress intended to tax only articles enumerated in the statute. To enumerate the various parts or accessories for automobiles would have been wellnigh impossible and practically futile as changes and improvements are being made constantly and new or different accessories are being devised. Congress, therefore, used generic terms with the intention that the provision would be construed to effectuate its purpose. The Treasury Regulations were designed to give effect to the intention of Congress and to resolve difficulties in administering the law. It is submitted that these Regulations reasonably interpret and apply the law.

As early as 1919, Article 16 of Regulations 47 provided that all articles primarily adapted for use in connection with an automobile were taxable as automobile parts or accessories. In subsequent years the provisions of the Code and Treasury Regulations interpreting the taxation of automobile accessories have remained substantially unchanged. Treasury Regulations and interpretations long continued without substantial change, applying substantially re-enacted statutes, are deemed to have received Congressional approval and have the effect of law. Indeed, in *Masao Hirasuna* v. *McKenney*, 245 F. 2d 98, 100, this Court applied and approved the selfsame section of the Regulations, which taxpayer attacks. See also *United States* v. *Armature Exchange, Inc.*, 116 F. 2d 969, 971 (C.A. 9th), certiorari denied, 313 U.S. 573; *Corn*

Products Co. v. *Commissioner*, 350 U.S. 46; *Helvering* v. *Winmill*, 305 U.S. 79.

Under the provisions of the Treasury Regulations quoted above, if the primary use of an article is in connection with an automobile, it is a part or accessory, and it need not be essential to the operation or use of the automobile. Taxpayer is thus in error in arguing (Br. 16) that to be taxable an article must be related to the function, utility or ornamentation of the automobile. Furthermore, under the Regulations it is clear that if, as here, an article is designed primarily for use on an automobile, the fact that it is susceptible of some other uses for which it is not so well adapted does not relieve the manufacturer of the tax on its sale. In *Universal Battery Co.* v. *United States*, 281 U.S. 580, the Supreme Court stated that it would be unreasonable to hold that articles can be classified as parts or accessories only where they are adapted solely for use in motor vehicles and are exclusively so used. It stated (p. 584):

> We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

See also *Benmatt Organization, Inc.* v. *United States*, 236 F. 2d 959 (C.A. 9th), affirming *per curiam* 134 F. Supp. 511 (S.D. Cal.); *Masterbilt Products Corp.* v. *United States*, 42 F. Supp. 294 (C. Cls.).

Taxpayer argues (Br. 20) that his baby bottle

warmers were equally adapted to other uses. That some may have been bought as gifts, however, does not deny that the primary *use* of the article was in connection with an automobile. They were sold as *bottle warmers*, and taxpayer advertised them as the "Auto Nurse" and on his business stationery printed a picture of an automobile with the statement "Auto Nurse warms Baby's food—on the Go!" Taxpayer argues (Br. 19, 20) that the intent of the manufacturer does not control taxability of the article. However, this Court can hardly be expected to find that the articles were not what taxpayer said they were in his own advertisements. See *Red Star Yeast & Products Co.* v. *LaBudde*, 83 F. 2d 394 (C.A. 7th). That the articles may have been suitable for keeping food hot without any connection to the automobile again does not gainsay that primarily they were sold as bottle *warmers*, and would have to be connected with the automobile to get food hot before it could remain so. Their use as a bottle holder was certainly incidental to their primary purpose of warming bottles. (R. 85.) *There was no way in which these articles could warm bottles except in connection with an automobile, unless the purchaser obtained a converter to adapt the article for home use.* (R. 82-86.) The taxpayer, however, did not sell such converters (R. 83-84), and to obtain one would naturally add considerably to the initial cost of the device.[4]

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[4] The wholesale price charged by taxpayer for the bottle warmers depending upon the model was $1.33 and 75 cents to 89 cents (R. 65); the cost of a converter was quoted to him at 89 cents. (R. 84.)

There is nothing in the record before this Court to refute the finding of the District Court (R. 36) that the primary purpose of the bottle warmers was use in connection with automobiles; indeed the record fully sustains this finding. The taxpayer failed to carry his burden of proving otherwise. In *Perfection Gear Co.* v. *United States*, 41 F. 2d 561, the Court of Claims had for consideration the question of whether certain timing gears were taxable as parts for automobiles. In sustaining the defendant's position, the court observed (p. 562):

> When the primary and chief use of an article is established that subjects it to the tax, the manufacturer can not escape the tax upon his entire sales by showing that the article could and may have been used for some other purpose, without showing the number of those sold and taxed that were so used.

In S. T. 834, XV-1 Cum. Bull. 396 (1936), baby auto seats, auto beds, and auto hammocks were held to be taxable automobile accessories inasmuch as they were designed for use in connection with an automobile. Again, in Rev. Rul. 57-231, and Rev. Rul. 57-232, 1957-22 Int. Rev. Bull. 12, 13, heating pads and utility lights which are primarily designed to operate from a cigarette lighter or similar outlet in an automobile electrical system were held to constitute automobile parts or accessories and subject to the manufacturers excise tax imposed by Section 4061(b) of the Internal Revenue Code of 1954, which is substantially similar to the section of the 1939 Code here in question. Likewise, in Rev. Rul. 56-544, 1956-2 Cum.

Bull. 797, the manufacturers' excise tax was held applicable to air-conditioning units which are designed for operation from a cigar or cigarette lighter plug of an automobile. Thus the Treasury Department is consistently ruling that articles such as the baby bottle warmers here in question, equipped with an electrical connection permitting them to be inserted into the cigarette lighter receptacle of an automobile, thus utilizing the electrical wiring system of the automobile as well as the source of electricity therein, are primarily designed to be attached to, and used in, the automobile, and therefore are parts or accessories within the meaning of Code of 1939 Section 3403(c).

Taxpayer attempts (Br. 15-16) to attach some significance to the fact that the Treasury Department first ruled that taxpayer's baby bottle warmers were not taxable, but within a year decided that they were and issued a published ruling to that effect, Rev. Rul. 56-293, 1956-1 Cum. Bull. 505. It is clear, however, that the Commissioner can, even with retroactive effect,[5] remedy prior incorrect rulings. The Commissioner is not bound by his own or his predecessor's prior mistakes of law. *Automobile Club of Michigan* v. *Commissioner* 353 U.S. 180; *Campbell* v. *Brown*, 245 F. 2d 662, 666 (C.A. 5th); *Chiquita Mining Co.* v. *Commissioner*, 148 F. 2d 306 (C.A. 9th); *Tonningsen* v. *Commissioner*, 61 F. 2d 199 (C.A. 9th); *Goldfield Consol. Mines* v. *Scott*, 247 U.S. 126.

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[5] Here, of course, the ruling of which taxpayer complains, had no retroactive effort. Thus, the taxable period was February 14, 1951, to November 17, 1954 (See fn. 1 *supra*) the mistaken ruling was made on February 4, 1955 (R. 20-21) and corrected under date of December 8, 1955. (R. 21.)

The cases of *Cuno Engineering Corp.* v. *United States*, 43 F. 2d 259 (C.Cls); and *Smith* v. *McDonald*, 214 F. 2d 920 (C.A. 3d), relied on by the taxpayer (Br. 12, 13, 14, 15, 16, 18), are distinguishable on their facts, as pointed out in *Benmatt Organization* v. *United States*, *supra*. In the *Cuno* case, *supra*, the Court of Claims held in effect that the cigar lighter in question was equally well adapted for use other than in connection with an automobile; and in the *McDonald* case, *supra*, the Third Circuit held that the character and use of electric signs on taxicabs were analogous to the character and use of taxi meters which are expressly excluded from the tax on parts or accessories. These cases are in no way analogous to the instant situation.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

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January, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) [as amended by Section 544 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 481 (a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof) 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) [as amended by Sec. 481 (b) of the Revenue Act of 1951, *supra*] *Other Chassis and Bodies, Etc.*—Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum, except that on and after April 1, 1954, the rate shall be 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) [as amended by Sec. 544 (b) of the Revenue Act of 1941, *supra;* Sec. 605 (c) (1) of the Revenue Act of 1950, c. 994, 64 Stat. 906; and Sec. 481 (c) of the Revenue Act of 1951, *supra*] ~~Sec. 601 (a) (8) of the Excise Tax Reduction Act of 1954, c. ——~~. Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1955, the rate shall be 5 per centum. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.):

Sec. 316.55 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267, and T. D. 5854, 1951-2 Cum. Bull. 205] *Definition of parts or accessories.*— The term "parts or accessories" for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, or automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts or accessories. With respect to fare registers and fare boxes for use on buses and automobiles, see section 316.140.

The term "parts and accessories" shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations

are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use.

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